No. 14080.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KEN FOON as Guardian *Ad Litem* for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

JURISDICTIONAL STATEMENT.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C., Sec. 903).

Judgment for the defendant was entered April 9, 1953, and the jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., Sections 1921 and 1294(1).

II.
STATEMENT OF THE CASE.

Appellant seeks admittance to the United States as blood son of a citizen of the United States under the provisions of 1993, Revised Statutes of the United States.

The lower court has determined that the appellant has not sustained his burden of proof and has determined that the appellant is not a citizen or national of the United States [T. R. 15, 17].

III.
STATEMENT OF FACTS.

Wong Ken Foon, the alleged father of the appellant, was admitted to the United States, as the son of a native, at San Francisco, California, on December 27, 1920, he having been born in China and having first arrived in the United States on November 26, 1920.

Wong Ken Foon has made two trips from the United States to China. On the first trip he departed from San Francisco, California, September 27, 1926, and returned to San Francisco on October 5, 1927. On his second trip he departed from Los Angeles, July 10, 1932 and returned to Los Angeles, August 21, 1933.

All of the foregoing facts have been conceded by the pleadings [T. R. 4, 8].

The appellant came to the United States for the first time via airplane to the City of Los Angeles, California, in January, 1952. He came on travel papers (not a passport) issued by the American Consul in China [T. R. 33].

Upon the arrival of the appellant, on or about January 18, 1952, he was held by the Immigration and Naturalization Service pending a determination of his status. On February 15, 1952, after hearings before the Board of Special Inquiry of the Immigration and Naturalization Service at San Pedro, California, said Board denied the appellant's application for admission and recognition as a United States citizen. The decision of the Board of Special Inquiry, excluding the appellant from the United States, was affirmed by the Board of Immigration Appeals. Thereafter, appellant, through his Guardian *Ad Litem* Wong Ken Foon, filed the judicial proceedings to have his claim of citizenship determined by the District Court.

The appellant was allegedly born in Nom On village, Kwangtung Province, China, on June 24, 1927, the alleged issue of the marriarge of Wong Ken Foon and Eng Shee, allegedly married on September 28, 1926, in the same village [T. R. 4, 39].

The appellant is alleged to have lived in the village in which he was born from the date of his birth until 1948, a period of twenty-one years, living in the same house, in the same village until he departed in 1948 for Hong Kong, preparatory to coming to the United States [T. R. 39-40, 49].

At the trial of the issues appellant presented, in addition to his own testimony, the oral testimony of the alleged father, testimony of an accountant, that prepared the Withholding Tax Employee's Receipt for Wong Ken Foon's employer, and one Wong Wing Yen, who visited appellant's home in China for about fifteen minutes in 1946, where he saw appellant for the first time [T. R. 137].

IV.

QUESTIONS INVOLVED.

The major question raised by Appellant's Brief is whether or not the trial court erred in allowing in evidence the transcript of testimony of the plaintiff at the immigration Hearings in February, 1952.

Other questions raised by appellant may be stated thusly:

> Did the Court rely upon conjecture in relation to the conduct of the appellant?
>
> And, did the appellant sustain his burden of proof?

V.

ARGUMENT.

A. The Court Properly Received in Evidence the Transcript of Appellant's Testimony Before the Board of Special Inquiry of the Immigration Service.

At the outset of the trial the following colloquy took place:

> "Mr. Talan: May we also have entered the record of the administrative proceeding, and a stipulation that it is authentic and a true and correct copy of the hearing that was reported therein?
>
> Mr. Brennan: Yes, subject to our calling to the court's attention any discrepancies that might have occurred by reason of the interpreter's translation. We have no question about the authenticity of the record or its correctness as interpreted, and we are not raising any technicality on getting the record in, but we are not stipulating as to the accuracy of the transcript and of the interpeter's remarks.
>
> Mr. Talan: That is accepted." [T. R. 21-22.]

When upon cross-examination appellant's counsel wished to use the transcript of appellant's previous testimony, he offered it for identification, and it was marked Defendant's Exhibit A for identification [T. R. 50].

The court made inquiry as to when and where the transcript was made and questioned counsel for appellee to determine that it was a true transcript of the hearing and not a summary [T. R. 62-63].

Later, during the cross-examination of the appellant, and toward the end thereof, Defendant's Exhibit A for identification was offered in evidence. There was no objection by appellant's counsel, and the exhibit was received in evidence [T. R. 102].

Where appellant's testimony during the trial differed from that contained in the transcript of his previous testimony, as contained in Exhibit A, the question and answer was first called to the attention of the appellant, that is, the question was read to him, together with his answer, and he was asked if that question was asked and if that was his answer. In almost every case the appellant admitted that the question and the answer read to him was his previous testimony. Wherever he felt it necessary he tried to explain why his previous answer differed from that now given before the court.

His previous testimony was admissions of the appellant, a *party* to the action, present in court, with an opportunity to explain the previous statements now conflicting with his present testimony.

Appellant now contends that because an action brought under Section 503, the Nationality Act, 8 U. S. C., Section 903, is an independent action, any of appellant's statements

before the Administrative Hearing are not admissible, merely because they were given in an Administrative Hearing.

This is fallacious reasoning. We are not dealing with testimony of third persons given in another action, and the reliance of the appellant on *Wong Wing Foo v. McGrath,* 195 F. 2d 120 (C. A. 9, 1952), is misplaced. In that case the testimony of an alleged uncle in an Administrative Hearing was sought to be introduced as evidence without the uncle being called to testify as a witness. He was available to testify. His testimony was clearly hearsay. He was not a party to the action and the court held that the exception to the Hearsay Rule, where such a witness is dead or otherwise not available, was not applicable. The inadmissibility of the uncle's testimony was obvious. There was no opportunity for him to be cross-examined on his previous testimony.

It can be assumed with certainty that the court in the *Wong Wing Foo* case did not intend to lessen the value of a *party's* admissions merely because they arose in an Immigration Hearing before the Administrative Board.

As stated in *Milton v. United States,* 110 F. 2d 556, 560 (C. A. D. C., 1940): Evidence offered to prove admissions need not have been given in a courtroom or under oath but the fact that it was so given, does not detract from its admissibility.

See also:

Warde v. United States, 158 F. 2d 651 (C. A. D. C., 1946).

And particularly:

Schoeps v. Carmichael, 177 F. 2d 391 (C. A. 9, 1949),

in which Judge Bone in a footnote No. 11, at page 397, enunciates completely the proposition stated above.

Wigmore in Volume IV, page 4 of his works on *Evidence* (3rd Ed.) states:

> "The Hearsay Rule, therefore, is not a ground of objection when an opponent's assertions are offered *against* him; in such case, his assertions are termed admissions."

Wigmore states that the probative value of admissions is twofold:

First, all admissions may furnish, as against the opponent, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; and

Second, all admissions, used against the opponent, satisfy the Hearsay Rule, and when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances.

> "* * * an admission is equivalent to affirmative testimony for the party offering it."
>
> IV *Wigmore on Evidence,* Sec. 1048, p. 6.

Previous statements of the party to an action, conflicting with his testimony, constitute substantive evidence against him.

> *Harrison v. United States,* 42 F. 2d 736 (C. A. 10, 1930).

Not only are the courts consistent in ruling upon the admissibility of admissions, but they emphasize the probative value thereof or as Wigmore says:

> "An admission is equivalent to affirmative testimony for the party offering it."

The Court in *Harrison v. United States, supra,* states that such testimony constitutes substantive evidence while the Court in *Milton v. United States, supra,* states at page 560:

> "Admissions have probative value, not because they have been subjected to cross-examination and therefore satisfy the Hearsay Rule, but because they are statements by a party opponent inconsistent with his present position as expressed in his pleadings and testimony."

Thus, we see that not only was Exhibit A admissible, but it was equivalent to *affirmative testimony* for the party offering it.

Bearing in mind that appellant's counsel stipulated that the record of the Administrative Proceedings was an authentic and true and correct copy of the hearing that was reported therein, and that counsel raised no objection to its being offered in evidence, he now claims, however, that it was inadmissible.

Appellant stated in his Brief at page 8 thereof that "the witnesses were not only available but were actually present in court during the trial of the action. Therefore, as they were not 'shown to be dead or otherwise not available,' the Court should not have admitted Defendant's Exhibit 'A.' * * *"

The very reasons that make the prior admissions admissible, to-wit, the presence of the party to testify before the court, to be cross-examined, and to explain his previous inconsistent statements being used against him, are the reasons why such testimony is admissible.

Judge Wyzanki of the District of Massachusetts discusses the problem in *United States v. United Shoes Ma-*

chinery Corporation, 89 Fed. Supp. 349, at 351-352 he states:

> "It has sometimes been erroneously said that extra-judicial admissions are receivable against a party as an exception to the hearsay rule and that the reason for the exception is either because in that party's eyes the statement must at one time have seemed trustworthy or because it is only fair to put upon that party the burden of explaining his own declaration. But the masters of the law of evidence now agree that this is not the correct rationale. *Morgan, The Rationale of Vicarious Admissions,* 42 Har. L. Rev. 461; *Wigmore, Evidence,* 3d Ed., §1048. See *Napier v. Bossard,* 2 Cir., 102 F. 2d 467, 468; *Milton v. United States,* 71 App. D. C. 394, 110 F. 2d 556, 560. Unlike statements of fact against interest (sometimes loosely called admissions), an extra-judicial admission of a party is receivable against him not as an exception to the hearsay rule but as not being within the purpose of the hearsay rule. The hearsay rule is a feature of the adversary system of the common law. It allows a party to object to the introduction of a statement not made under oath and not subject to cross-examination. Its purpose is to afford a party the privilege if he desires it of requiring the declarant to be sworn and subjected to questions. That purpose does no apply, and so the hearsay rule does not apply, where the evidence offered against a party are *his* statements."

Thus appellee finds no fault with the case citations of the appellant on pages 9 and 10 of his Brief, other than the fact that they apply to cases where testimony is offered in place and stead of the witness who is available. They have no application to the instant use by the appellee of admissions.

Appellant states at page 10 of his Brief:

> "It is therefore respectfully submitted that the evil of permitting a transcript of proceedings before the Special Board of Inquiry and other administrative proceedings is that the Court will undoubtedly consider the statements and representations of the witnesses without having an opportunity to hear their actual testimony, or observe their demeanor, or determine properly the authenticity of their statements."

How can this be applicable to the instant case?

Here the Court had an opportunity to hear the actual testimony of the appellant, to observe his demeanor, and to hear his explanation for statements previously made which differed from those presently made.

Counsel for the appellant goes on to say at page 11 of his Brief: "In the proceedings before the lower Court, the Court should have only considered the actual testimony of the witnesses and not permitted itself to be swayed by the proceedings before the administrative board."

Thus, counsel desires to limit trials to mere testimony of the witnesses without opposing counsel to have the opportunity to say to the witness: "You say this now, but on such and such a date, before such and such parties, you said this."

This is obviously tenuous reasoning and appellant should be called upon to explain any difference between his present position and the position he took under oath upon another occasion.

B. Inherent Improbability in the Statements of the Appellant.

It was in 1891 that Justice Field of the Supreme Court of the United States, in the case of *Quock Ting v. United States,* 140 U. S. 417, first stated at page 420:

> "There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. * * *"

Such inherent improbability is present in the statements of the appellant. He has testified that he was born in Nam On village, and has lived there all his life, a period of 21 years before going to Hong Kong in 1948, preparatory to coming to the United States. Nam On village is a village of 40 or more families. They live in 40 or more houses in the village. Yet the appellant testified before the Immigration Board of Inquiry, again and again, that he did not know the name of any member of the village except the person who owned the house at the tail-end of the village. This testimony appears at page 8 of Exhibit A and is called to the appellant's attention at page 78 of the Transcript of Record. He further testified that he could not remember who occupied the house next door to the one in which he claims he lived.

At page 80 of the Transcript of Record, appellant's attention is called to page 9 of Exhibit A and he was asked whether he gave the following answer to the following question:

> "Do you mean to say that you lived 21 years of your life in your house in Nam On village and can't tell us positively who occupied the house connected to it with a common wall, when you only left there 4 years ago?

There are so many houses in the village, I just can't remember."

Appellant at the trial answered "Yes."

One occupant of the village the appellant remembers. He is Wong Wah See who lived at the tail-end of the village. Appellant testified that he remembered the owner of that house because Wong Wah See is a bachelor, a little bit older than the appellant, whom he visited all the time [T. R. 79].

The alleged father Wong Ken Foon testified that Wong Wah See was married, had a wife and two daughters. He testified before the Board of Special Inquiry that Wong Wah See was in his fifties when the witness was last in the village of Nam On in the year 1933. When the testimony of the appellant was called to the attention of Wong Ken Foon he stated that he was talking about the age of Wong Wah See at this time which would be about 50. The Court then asked at page 120 of the Transcript of Record:

"Court: How many years ago was it when you were in China?

Witness: About 20 years ago.

Court: So when you were in China he was about 30 then?

Witness: I thought he was in his 30's, I never asked his age."

Appellant admitted in his testimony at the trial [T. R. 76] that he was asked in the Board of Inquiry hearing the following question:

"Q. According to your testimony, you lived in this same village, in the house in which you were

born, from the time of your birth until C. R. 37 (1948), or a total of 21 continuous years. Now you tell us that you are unable to state who lived in the house right next to yours during that time. Do you expect us to believe that statement? A. I never paid attention to other people in the village. I just knew our own house and the household members."

Appellant admitted that that was his answer.

This Court cannot say, as it did in *Mar Gong v. Brownell,* No. 13787, January 12, 1954, that this testimony does not relate to the basic issue whether Wong Ken Foon sired the plaintiff. For as stated by Judge Wilbur in the case of *Gung You v. Nagle,* 34 F. 2d 848, at 852:

> "* * * The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. *Such evidence is not collateral evidence, it is direct and material evidence on the issue."*

Here then is evidence that the appellant did not live all his life in Nam On village as he would request us to believe. It is direct and material evidence on the issue. He claims to have lived for 21 years in the same village in which he was born, the village in which his alleged parents have their home. Yet he does not remember any of the occupants of the village. His statements are so inherently improbable as to induce the Court to disregard his evidence, even in the absence of any direct conflicting testimony.

As stated by Justice Field in the *Quock Ting* case, *supra:*

> "He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. * * * All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Other inconsistencies appear in the testimony of the witnesses. Appellant contradicts himself as to the members of the household in his village home, and Wong Ken Foon's testimony as to the members of the household differs at various times [T. R. 51, 115-116].

Wong Ken Foon has not seen the appellant, his alleged son, for some period of 19 years. However, he produces testimony that he took four dependents relating to his withholding tax deductions. While the names he gives thereon for his alleged children are similar to those they now use, yet they differ materially. And, when he enumerates those who he claims dependents, he names them at page 133 of the Transcript of Record as "my wife, two sons, and *my mother.*"

Thus, if Wong Ken Foon included his mother as a dependent, there would be five dependents in the Withholding Tax exemptions since the witness is counted as one dependent. Thus, it would appear that the testimony which he uses to corroborate the size of his family is over-stated.

The testimony of Wong Wing Yen adds very little to the picture since by his own statement he saw the family

which he had never seen before, for a period of fifteen minutes, and testified to no statements of relationship that were made by the alleged mother or by the appellant.

In this case, this Court should have no difficulty in the application of the rule that the findings made by the trier of facts which refuse to credit a witness' testimony even though that testimony is not contradicted, should be upheld. *National Labor Relations Board v. Howell Chevrolet Co.,* 204 F. 2d 79, 86. The appellant, and his alleged father are interested witnesses, and when viewed in this light their mere say so does not have to be accepted. (*Flynn ex rel. Yee Suey v. Ward,* 104 F. 2d 900, 902; *Heath v. Helmick* (9th Cir.), 173 F. 2d 157, 161.)

In the *Mar Gong* case, this Court chose to give a "quantatitive and impersonal measure to the testimony" contained in the record. (The language is that of Wigmore.) And to paraphrase the language of Judge Sandborn of the Eighth Circuit in *Knowland v. Buffalo Insurance Co.,* 181 F. 2d 735, 739, this Court imputed to the trial court a disregard of his duties and responsibilities for a want of diligence or perspicacity in evaluating the credibility of witnesses and the weight of evidence. It would seem that the Court in that case pin-pointed the discrepancies to determine the weight of each one rather than to determine the overall picture of all the testimony and the credibility and probability of said testimony given by the witnesses.

In the instant case, however, such doubt is thrown upon the appellant's claim that he was born and raised in the village of his alleged family, and was residing there with them until he reached the age of twenty-one years, as to make his membership in that family an improbability. For

this reason, when appellant's counsel sought a continuance to enable him to bring the alleged mother of the appellant to the United States to testify (a task which counsel thought would take but a short time) the trial court in his discretion denied the continuance on the ground that her testimony would be merely cumulative and would not cure the improbability of the appellant ever having lived all of his life in a village where he could not remember the name of his next door neighbor. This, it is submitted, is a proper exercise of discretion. And the Court's colloquy with counsel regarding said continuance may be found at page 140 of the Transcript of Record.

C. Cases Cited by the Appellant.

Counsel for appellee would be remiss in his duty to this Court if he did not distinguish the cases cited by the appellant and call the Court's attention to their inapplicability.

The misapplication of *Wong Wing Foo v. McGrath, supra,* has already been called to the Court's attention elsewhere in this Brief. For the reasons given with regard thereto the cases cited on page 9 by the appellant in his Brief are likewise inapplicable.

The cases of *Acheson v. Yee King Gee,* 184 F. 2d 382; *Wong Gan Chee v. Acheson,* 95 Fed. Supp. 815; and *Toy Teung Kwong v. Acheson,* 97 Fed. Supp. 745, are cited at page 13 of appellant's Brief in support of the statement:

> "That once the relationship of the appellant to the said Wong Ken Foon, his alleged father, a recognized United States citizen has been established by evidence of record, the appellant must be deemed to have ac-

quired United States citizenship in accordance with the provisions of that statute. The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality."

However, in each of these three cases the *relationship* of the plaintiffs to the putative fathers *was conceded* and the sole question before the court was whether the father had sufficient residence in the United States to comply with the statute and to thus confer citizenship on their children. The claim to citizenship referred to by the court in each of the three cases was that of the fathers, and not the claim of the alleged children. It is submitted these cases have no application here.

At the bottom of page 13 of appellant's Brief he concludes that the sole issue therefor is one of relationship and cites *Quan Toon Jung v. Bonham,* 119 F. 2d 915, 916, and *Yep Suey Wing v. Berkshire,* 73 F. 2d 745, 746. However, inherent in the question of relationship is the matter of identity. Who is the person who claims to be the son of a citizen father? Can it be this appellant, who cannot remember the names of occupants of a village of a mere 40 families? A village wherein he was born and resided for 21 years?

Appellant on page 14 of his Brief submits that he has made a *prima facie* case. The burden of going forward consequently shifts to the defendant. He cites *Lilienthal's Tobacco v. United States,* 97 U. S. 237. However, Judge Garrecht, speaking for this Court in *Mui Sam Hun v. United States,* 78 F. 2d 612, in an opinion subscribed to

by Judges Wilbur and Denman without dissent, at page 615 said:

> "The rule is not, as appellant contends, that the applicant need only make out his case by a fair preponderance of the evidence, for it is not encumbent upon the Government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witness, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary and capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board."

Judge Goodman and Judge Dal M. Lemon have both recognized that the burden is not met by a mere preponderance of evidence, the evidence must be "clear and convincing."

VI.
CONCLUSION.

To briefly summarize then, appellee's contentions, the following points should be made:

(1) Defendant's Exhibit "A" was admissible and was competent evidence. "An admission is equivalent to *affirmative testimony* for the party offering it."

In *Wong Wing Foo, supra,* the Court stated: "At the trial below plaintiff and Wong Yem, his alleged father, a citizen, testified and the testimony they gave before the Board of Special Inquiry was also admitted with the consent of the plaintiff." Thus the testimony of the two witnesses before the Court was admitted. It was the testi-

mony of Uncle Wong Gong, who was not before the Court, that is inadmissible.

In the *Mar Gong* case, *supra,* this Court accepted as perfectly proper the use of testimony that the witnesses previously gave before a Board of Special Inquiry "to turn up discrepancies in their testimony." And stated: "It is now claimed that when the record of these earlier examinations is laid alongside of the testimony in the court below * * *." Consequently, appellant has tried to bring into the Hearsay Rule that which is not considered hearsay.

Thus, we see that not only was Exhibit "A" admissible but it was equivalent to *affirmative testimony* for the party offering it.

(2) Appellant's statements contain such an inherent improbability as to induce the Court to disregard his evidence. One cannot live for twenty-one years in a village of 40 houses and be absolutely unacquainted with his surroundings and its occupants.

(3) "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * How can we say the judge is wrong? We never saw the witnesses * * * to the sophistication and sagacity of the trial judge the law confides the duty of appraisal." (*Boyd v. Boyd,* 252 N. Y. 422, 429, as adopted by Mr. Justice Jackson in *United States v. Oregon Medical Society,* 343 U. S. 326, 339.)

(4) The granting of a continuance for the purpose of producing so-called "cumulative evidence" was within the discretion of the trial court. Improbability of the appellant's testimony would not be cured by any testimony given by his alleged mother. It was no abuse of discretion by the trial court to deny a continuance that might have gone on for a time of years in view of the waiting list of those seeking to come to the United States from China, for any purpose.

(5) Appellant has stated no law that would justify this Court reversing the lower court upon a question of fact. The trial court, in view of the burden upon the appellant, could require clear and convincing proof. The lower court has found that he does not believe the testimony of the appellant and that there is not sufficient credible evidence to support appellant's claim that he is a United States citizen [T. R. 14].

Wherefore, for the reasons above given, it is respectfully requested that the Judgment of the lower court be affirmed.

Dated: March 1, 1954.

Respectfully submitted,

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